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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SHARON BONDS, *et al.*,
Petitioners,

v.

DISTRICT OF COLUMBIA AND DIRECTOR,
DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

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Respondents District of Columbia Department of Corrections, et al. ("the Department") mischaracterize this case when they seek to portray it as one about a sanction "equivalent in severity to a default judgment" (Br. in Opp. 8) imposed for a single instance of noncompliance with a discovery order related to a "sweeping interrogatory." *Id.* at 1-2. Rather, what led the District Court to impose the sanction at issue—after an explicit warning—was a pattern of continuous conduct by the Department, described in detail in the District Court's findings, aimed

at frustrating the ability of the District Court to bring this case to trial at the earliest possible time. Pet. 26a-36a, 59a-66a. As described in the Petition, the entire discovery period was marked by a series of retaliatory actions by employees and officials of the Department that threatened the plaintiffs' opportunity for a fair and prompt trial. Pet. 6-7, *see also* Pet. 72a-73a. The inadequate response to the disputed interrogatory, which triggered the imposition of sanctions, was simply the culmination of a series of actions by the Department that threatened to undermine the District Court's ability to bring this case to trial in accordance with a previously announced schedule. Pet. 72a-73a.

Although the Department now insinuates that the disputed interrogatory was overbroad, it never objected to it in the District Court. Pet. 36a. Instead, it waited until the day its response was due and then requested an extension, which was granted in an Order informing the Department that failure to comply with the extended deadline would result in the very sanction ultimately imposed. Pet. 7, 29a. The Department missed the extended deadline and three days later "responded" by referring to all of the documents that had been or were to be produced in discovery.[1] Pet. 7, 31a. The Court imposed the threatened sanction, and despite the Court's explicit invitation, the Department waited yet another month to move for reconsideration, at which point it made one more meaningless response. Pet. 7-8, 32a-33a. Furthermore, the Department offered shifting explanations for its failure to comply with the District Court's order, some of which the Court rejected as not credible. Pet. 8, 70a-71a. In light of what the District Court Judge described as the most "blatant and widespread disrespect for judicial authority" he had seen in his time on the bench, the imposed sanction

[1] Both the Department's failure to comply with the deadline and its subsequent meaningless response were failures to answer the interrogatory within the meaning of Fed. R. Civ. P. 37(d). Therefore, the District Court's reliance on that provision was not "plain error" as alleged by Respondents. Br. in Opp. 6 n.2.

was necessary to protect the integrity of the Court's authority. Pet. 67a-68a.

2. The Department completely fails to address Petitioners' central argument that the Court of Appeals' decision in this case is inconsistent with this Court's holding in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam), that the appellate courts may not substitute their judgment for that of the District Courts in determining whether deterrent sanctions are necessary. Instead, the Department devotes most of its Opposition to asserting that its failure to comply with the District Court's discovery order should be excused because of the burdens on the Department's counsel, a rationale specifically rejected by this Court in *National Hockey League*, 427 U.S. at 641-43. *See* Br. in Opp. 1-10.

As with the opinion of the Court of Appeals, the Department focuses exclusively on the actions of counsel and ignores the actions of the parties, *i.e.*, the Department and the District of Columbia government. Yet this case is not about the actions of counsel, but about the actions of the parties, and it is the parties that bear the ultimate responsibility for how the litigation is conducted. Thus, the Department's argument does not address the fundamental question of whether the party, *i.e.* the District of Columbia government, acted in a fashion that was so inimical to the judicial process that the sanction imposed was warranted for its deterrent effect.

3. Even in the section of its Opposition devoted to argument, the Department fails to address seriously Petitioners' arguments. In attempting to demonstrate that the decision of the Court of Appeals is consistent with this Court's precedents, the Department relies on a comparison of the delay in responding to discovery in this case with the delays in *National Hockey League* and *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites*, 456 U.S. 694 (1982). Br. in Opp. 11-12. This com-

parison is inapposite because it does not address the fundamental issue of the appropriate scope of appellate review. Even if it were relevant, the important issue is not the length of the delay but the impact of the discovery violation on the judicial process. In this case, the rampant retaliation in which the Department had engaged amplified the effect of any discovery violation and justified the deterrent sanction imposed by the District Court for that violation. *See* Pet. 72a-73a.

The Department also makes the startling assertion that it is entitled to special leniency because it is a government agency. Br. in Opp. 12. Yet, it is because the Department is a government agency that it is particularly dangerous when it places itself above the law. *See* Pet. 63a. When a government agency violates the public trust and attempts to thwart the judicial process through intimidation coupled with failure to obey discovery orders, as is the case here, the strongest sanctions available to the District Court are justified.

4. The Department fails to address Petitioners' argument that by placing the burden on the District Court to demonstrate the noncomplying party's bad faith and rule out the effectiveness of lesser sanctions, rather than placing these burdens on the party that has violated a discovery order, the Court of Appeals' decision is inconsistent with *National Hockey League*. *See* Br. in Opp. 13-16.

Instead, Respondents argue that rather than imposing a "bad faith" standard, the Court of Appeals imposed a standard of "flagrant and egregious conduct" for sanctions based on deterrence. Br. in Opp. 13-14. However, this argument ignores the fact that the Court of Appeals' opinion justifies its holding in part by its finding that the record failed to show "that the District acted in flagrant or egregious *bad faith*." Pet. 3a (emphasis added). Thus, it is apparent that the Court of Appeals reversed the District Court because it disagreed with that Court's finding that the Department's behavior was sufficiently oppro-

brious to warrant the imposed sanction. Pet. 18a-19a. Nothing in either *National Hockey League* or Rule 37 justifies imposing the additional requirement on the District Courts of finding that discovery misconduct was in flagrant or egregious bad faith as a condition for imposing deterrent based sanctions.

In addition, contrary to the Department's assertion that the opinion below requires the District Courts to "ordinarily consider" lesser sanctions (Br. in Opp. 15), the Court of Appeals squarely ruled that "the district court was *obliged* to consider whether the more severe sanction was necessary . . ." Pet. 14a; *see also* Pet. 57a ("Were we to conclude that the preclusion sanction imposed by the district court was tantamount to a default judgment, there would be no question . . . that the district court *must* consider lesser sanctions.") (emphasis added).[2] This holding is clearly at odds with *National Hockey League*, 427 U.S. at 642 ("the lenity evidenced in the opinion of the Court of Appeals . . . . cannot be allowed to wholly supplant other equally necessary considerations embodied in [Rule 37]"). The decision in *United States v. BCCI Holdings (Luxembourg)*, 169 F.R.D. 220, 223-24 (D.D.C. 1996), cited by the Department (Br. in Opp. 16), in which the District Court felt compelled by the Court of Appeals' holding to attempt a lesser sanction despite its own determination that default was already justified, demonstrates *not* that the holding of the Court of Appeals in this case is workable, but rather that it imposes burdensome and unnecessary requirements on District Courts. *See* Pet. 16.

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[2] Nor is there any significance to the fact that Petitioners had suggested a lesser sanction. The interests being protected in a discovery sanction based on deterrence are not those of the parties but those of the Court in protecting its authority and the integrity of its process. *National Hockey League*, 427 U.S. at 643. It is within the discretion of the trial court judge to determine what sanction is necessary to achieve that goal, and whether a lesser sanction would suffice to protect the interests of the parties is irrelevant.

In responding to Petitioners' argument that the Court of Appeals failed to apply the proper standard of review to the District Court's findings of fact, the Department ignores the fact that the Court of Appeals simply substituted its judgment for that of the District Court with regard to the need for deterrence, which is the focus of Petitioners' argument (*see* Pet. 17-21), and discusses only the Court's holdings on prejudice to the Plaintiffs and the Court's calendar. Br. in Opp. 17. The *National Hockey League* decision makes clear that deterrence is an equally necessary consideration in the exercise of District Court discretion to impose sanctions under Rule 37. *See* 427 U.S. at 642-43.

5. Finally, the Department's argument that the District Court erroneously applied Rule 37(b)(2) as a sanction for the Department's retaliatory activities (Br. in Opp. 17-18) is misplaced. The District Court appropriately punished those actions through injunctions and findings of contempt. Pet. 67a-68a. The role that the Department's retaliatory activities played in the District Court's discovery sanction was that the District Court was concerned that those activities would undermine the ability of plaintiffs to get a prompt trial. Pet. 26a, 72a-73a. Thus, they increased the significance of the Department's discovery violations and necessitated a strong sanction to ensure a timely trial. Moreover, there is nothing improper in the District Court weighing the entire record to determine whether the discovery violation merits a more severe punishment due to the entire pattern of conduct engaged in by the party during the course of pretrial proceedings. *See National Hockey League*, 427 U.S. at 642 (discovery sanctions based on consideration of the full record). Nothing in Rule 37 or the decisions of this Court requires a District Court Judge to cast a blind eye to a party's pattern of misconduct when meting out a punishment for a particular discovery violation.

Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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